BUGA SINGH v. KOH BON KEO

[A.C.J. (Raja Azlan Shah J.) July 16, 1966]

[K.L. — Civil Appeal No. 16 of 1966]

Practice and Procedure — Absence of plaintiff and his counsel — Case dismissed — Request for new trial.

In this matter the case of the appellant had been dismissed by the learned magistrate as on the date of the hearing neither the appellant nor his counsel was present in court. The appellant claimed for a new trial on the ground that it was not his mistake that his counsel had failed to appear.

Held: a new trial should be ordered, so long as the claim showed some merits and justice could be done by compensating the other side for any costs thrown away.

Case referred to:—

(1) *Hayman* v. *Rowlands* [1957] 1 All E.R. 323.

CIVIL APPEAL.

Appellant in person.

Lall Singh Muker for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The appellant in this case is a business man in Klang and he claims that $552 is the balance owing to him on an I.O.U. chit dated 1st February 1952 which was executed by the respondent in favour of him. Paragraph 4 of the statement of claim avers that on three occasions in 1963 the respondent paid him a total sum of $48. That is denied by the respondent. The case came up for hearing from time to time but was postponed for various reasons. The case was finally heard before the learned magistrate at Klang on 5th October 1965. On that day both the appellant and his counsel were absent but respondent and his counsel were present. In the circumstances the learned magistrate dismissed the case with costs.

It is in that state of affairs that the case comes before me this morning. The appellant now claims for a new trial on the ground that it is not his mistake that his counsel had failed to appear.

To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown away, then a new trial ought to be ordered. In the present case counsel for the respondent sought to argue that the claim bears no merits as it contravenes the limitation law, that is, the I.O.U. chit was executed in 1952 but action was brought in 1964. That may be so, but paragraph 4 of the statement of claim avers that in 1963 three sums of money were paid on various dates by the respondent in respect of the alleged loan. Therefore, if that averment is substantiated, the appellant's claim may be well founded as time runs afresh from date of payment, i.e. from 1963. That is an issue to be tried and, in my judgment, contains some merits.

It is not my intention to exegesise the law on this subject but I will merely refer to the case of *Hayman* v. *Rowlands* (1) where Denning L.J. had this to say:

> "I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter".

In my view there are some merits in the claim, and justice can be done by compensating the respondent for any costs thrown away. I will allow this appeal and order a fresh trial. The appellant will have to bear all costs thrown away by the respondent.

Appeal allowed.

Solicitors: *Lovelace & Hastings.*

BOOR SINGH v. ABDUL MAJEED

[A.C.J. (MacIntyre J.) July 16, 1966]

[Ipoh — Civil Appeal No. 11 of 1966]

Moneylenders — Acknowledgment by debtor of receipt of authenticated copy of promissory note — Onus of proof that provisions of Ordinance have not been complied with — Failure to keep regular books of account — Moneylenders Ordinance, 1951, ss. 16 and 18.

The learned president of the sessions court had dismissed a claim by the appellant for $1,700 and interest alleged to be due and owing on a promissory note executed by the respondent. The respondent had acknowledged receipt of an authenticated copy of the promissory note but at the trial he denied receipt of the copy. It was also alleged that the appellant had failed to keep regular books of accounts. The learned President dismissed the claim on the ground that the moneylender had failed to comply with the provisions of section 16(1) of the Moneylenders Ordinance, as he had failed to prove the delivery of the authenticated copy of the promissory note to the borrower.

Held: (1) the acknowledgment of receipt of the authenticated copy of the promissory note was sufficient, if unrebutted, to establish that the authenticated copy had been handed to the borrower and the onus was therefore on the borrower to prove that he did not receive it; the bare denial of the borrower was not sufficient to rebut the presumption arising from the signed acknowledgment;

(2) the court was not precluded from considering the evidence as to whether the claim was unenforceable for non-compliance with section 18(1) of the Moneylenders Ordinance and as it appeared in this case that the account books of the moneylender had not been regularly kept, the claim must be dismissed.

Cases referred to:—

(1) *Kartar Singh* v. *Mahinder Singh* [1959] M.L.J. 248.

(2) *Subramaniam* v. *Konar* [1962] M.L.J. 385.

(3) *Nawab Syed Alle Shah* v. *Mussamut Amanee Begum* (1873), 19 W.R. 149, 150.

(4) *Dinnath Rai* v. *Ram Rai* A.I.R. 1926 Patna 512.